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No. 75-1192

In the Supreme Court of the United States

OCTOBER TERM, 1975

WILLIAM PRENTIS TUCKER, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,

RICHARD L. THORNBURGH,
Assistant Attorney General,

JEROME M. FEIT,
ROBERT J. ERICKSON,
Attorneys,
Department of Justice,
Washington, D.C. 20530.

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OPINION BELOW

The opinion of the court of appeals (Pet. App.) is reported at 526 F.2d 279.

JURISDICTION

The judgment of the court of appeals was entered on January 22, 1976. The petition for a writ of certiorari was filed on February 20, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the evidence was sufficient to support petitioners' convictions.

2. Whether under 18 U.S.C. 3504 the government must affirm or deny the existence of illegal electronic surveillance upon a claim that such illegality "may" have occurred.

STATEMENT

Following a jury trial in the United States District Court for the Middle District of Georgia, petitioners were convicted on two counts of conducting an illegal gambling business and conspiracy to commit that offense, in violation of 18 U.S.C. 1955 and 371, respectively.[1] Petitioner Tucker was sentenced to concurrent terms of five years' imprisonment and was fined $20,000; petitioner Hughes was sentenced to concurrent terms of three years' imprisonment and was fined $10,000; petitioner Jackson was sentenced to concurrent terms of 18 months' imprisonment. The court of appeals affirmed (Pet. App. 1a-9a).

The evidence adduced at trial[2] showed that petitioners operated a gambling enterprise based upon daily stock and bond quotations on the New York Stock Exchange (Tr. 288, 558-564). To facilitate the enterprise, petitioners employed numerous individuals to take bets and transmit recorded wagers and money (Tr. 297, 303, 308). Petitioners Tucker and Hughes instructed these individuals in the procedures to be followed (Tr. 354-355, 429-430) and periodically collected tickets and money from them (Tr. 356, 432). On other occasions, the tickets and money were delivered to Ray Bradley's service station or Edward Nash's pool room (Tr. 364, 399, 467) and then forwarded to Jackson and Hughes (Tr. 84-86, 388-389). Once the tickets and money were collected, petitioners gathered at Hughes' trailer to count the cash receipts and

[1]Defendants Ray Bradley and Edward Nash pleaded guilty to these charges prior to trial.

[2]Seven unindicted co-conspirators testified concerning the gambling enterprise. Four of them testified that they had participated in the lottery operation during 1972-1973 (Tr. 84, 135, 350-351, 387, 429-430). Three of them testified that they had participated from 1969 or 1970 until the termination of the enterprise in December 1973 (Tr. 394-395, 405-406, 466-467).

check the tickets to determine which bettors had won (Tr. 84-85).

On December 18, 1973, pursuant to searches under warrants, federal agents seized tickets, lottery records and approximately $7,000 in cash from Hughes' trailer (Tr. 217-230), and lottery records from Bradley's service station (Tr. 243-244) and from Nash's pool room (Tr. 245-247, 252-262). The records showed that the gambling enterprise had operated at least since September 1973 (Tr. 292-294, 300-314, 317-322); that daily gross revenues often had exceeded $2,000 (Tr. 346); and that annual gross revenues had exceeded $1.1 million (Tr. 346-348).

ARGUMENT

1. Petitioners contend that the evidence was insufficient to support their convictions. 18 U.S.C. 1955 defines an "illegal gambling business" as one which is in violation of law, which "involves five or more persons who conduct, finance, manage, supervise, direct, or own all or part of such business" and which "has been or remains in substantially continuous operation for a period in excess of thirty days or has a gross revenue of $2,000 in any single day" (18 U.S.C. 1955(b)(1)(ii), (iii)). The jury was instructed in terms of this definition (Tr. 645).

The evidence, when viewed in the light most favorable to the government (*Glasser* v. *United States*, 315 U.S. 60, 80), was sufficient to support such findings. The three petitioners operated the enterprise in cooperation with Bradley and Nash; the enterprise had been in existence from January 1973 until its termination in December 1973; and daily gross revenues often exceeded $2,000.

2. Petitioners also contend that the district court erred in denying their pretrial motions to compel disclosure of any electronic surveillance, without requiring

that the government affirm or deny that it engaged in illegal electronic surveillance. Petitioners rely on 18 U.S.C. 3504(a)(1), which provides that upon a claim by an aggrieved party that evidence is inadmissible because it is the primary product of an unlawful act or was obtained by the exploitation of an unlawful act, "the opponent of the claim shall affirm or deny the occurrence of the alleged unlawful act."

Prior to trial, petitioners[3] moved to compel disclosure of any electronic surveillance. In memoranda supporting that motion, petitioners alleged that "the Government *may* have conducted illegal electronic surveillance on them and their attorneys * * * (emphasis added)" (Pet. App. 4a). The memoranda contained no additional supporting facts or affidavits. The district court denied the motion on the ground that petitioners had failed to make a "claim" sufficient to require that the government affirm or deny illegal electronic surveillance under 18 U.S.C. 3504(a)(1).

Whether a claim under Section 3504 must show some basis for suspecting an illegal action (see *United States* v. *See*, 505 F.2d 845 (C.A. 9), certiorari denied *sub nom. Gordon* v. *United States*, 420 U.S. 992) or need amount to no more than a "mere assertion" (see *In re Evans*, 452 F.2d 1239, 1247 (C.A.D.C.)), the statute clearly requires, as a bare minimum, that the defendant actually claim that illegal surveillance has occurred and that evidence gained therefore is inadmissible. *United States* v. *Toscanino*, 500 F.2d

[3]Petitioner Jackson did not raise this claim either in the district court or the court below (see Pet. App. 3a-4a).

267 (C.A. 2).[4] Petitioners, however, did not claim that they had in fact been the subject of illegal electronic surveillance or that any evidence introduced against them was the result of any such surveillance. Their motion was simply "a fishing expedition" (*United States* v. *See, supra*, 505 F.2d at 856), and the district court was accordingly correct in finding that it did not entitle petitioners to put the government to the trouble of canvassing the various agencies whose law enforcement techniques include the use of electronic surveillance.

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

RICHARD L. THORNBURGH,
Assistant Attorney General.

JEROME M. FEIT,
ROBERT J. ERICKSON,
Attorneys.

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[4]Clearly, petitioners' assertion that their counsel may have been the subjects of electronic surveillance is insufficient to require an affirmation or denial by the government. As the court of appeals noted in *Beverly* v. *United States*, 468 F.2d 732, 752 (C.A. 5):

> [A]ffidavits [alleging unlawful electronic surveillance of counsel] should as a minimum name the counsel in question, the outside dates of attorney representation and suspected surveillance, the [clients] represented by such counsel, as well as the numbers of the telephones over which the surveillance might have occurred and any other available data tending to identify the suspected surveillance.

See also *United States* v. *Alter*, 482 F.2d 1016, 1026 (C.A. 9).

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